No. 05-296

Supreme Court, U.S.
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In The
Supreme Court of the United States

EDWIN GOMEZ and
JONATHAN S. LONDONO,

Petitioners,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether this Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005), overruled or modified the holding in *Blakely v. Washington*, 542 U.S. 296 (2004).

II.

Whether this case provides an appropriate vehicle to review the first question, given the fact that the state court judgment rests on adequate and independent state-law grounds.

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OPINIONS BELOW

The opinion of the Supreme Court of Tennessee (Pet. App. 1) and the order denying the petitions for rehearing (Pet. App. 141) are published at 163 S.W.3d 632, 672. The opinion of the intermediate Court of Criminal Appeals (Pet. App. 146) is unpublished but available at 2004 WL 305787.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on April 15, 2005, and rehearing was denied on May 18, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

1. Shortly after 9:00 A.M. on March 17, 1999, security guards Roy Rogers and Eugene Nagele were removing approximately $750,000 worth of Rolex watches from a jewelry store at a Nashville shopping mall in order to transport them to another store for display. The watches, which had been the subject of a well-publicized showing the day before, were stored in metal boxes and placed on a luggage cart, and Rogers and Nagele pushed the cart from the store into the adjoining parking garage where they had parked. Before they arrived at their vehicle, assailants attacked them from behind. Nagele testified that he heard the sound of footsteps "rushing" toward him, but before he could turn toward the assailants, he was struck on the back of the head. Before losing consciousness, he heard a gunshot. When he regained consciousness, he

heard Rogers calling for him and, realizing that Rogers had been shot, rushed to assist him. The assailants took the boxes and Rogers' pistol and fled. Rogers died three weeks later of complications from a single gunshot wound. Nagele was unable to identify any of the assailants, but he recalled hearing them speaking a language other than English. (Pet. App. 6-7)

Deborah Sloan testified that she arrived at the mall that day between 9:10 and 9:15 A.M., and, after parking in the garage adjoining the mall but before exiting her vehicle, she "heard a bang, a loud bang, and a lot of running and rustling and things like that." She saw three assailants, two of whom carried away the metal boxes. The third "lean[ed] over beside the man who was lying on the ground and pick[ed] up a gun." She decribed the men as young, in their twenties, having dark skin and hair, and being of "fairly average" height and weight, and stated that they left in a "deep red" or "purplish-maroon" Chrysler minivan. She identified the three men as petitioner Edwin Gomez ("Gomez"), petitioner Jonathan S. Londono ("Londono") (collectively "petitioners"), and Bryant Guartos in a photgraphic array shown to her before trial and affirmed her identification of petitioners in court at their joint trial. (Pet. App. 7-9)

Barbara Franklin, an employee of the jewelry store, testified that on the afternoon before the robbery two Hispanic men had come into the store, and the shorter man, whom she later identifed as Guartos, had asked questions about the watches and about which merchandise would remain in the store after the showing. This man had "spoke[n] English very haltingly," as if "English [were] not his first language," and the taller man, whom she did not identify, had not spoken at all. (Pet. App. 10)

Based on a tip and information witnesses had provided at the scene, investigators canvassed the hotels and motels along the interstate highways west of Nashville. On March 19, investigators learned that four Hispanic men, driving a white van and a maroon van, had rented two rooms at a Howard Johnson's motel at Interstate 40 and Charlotte Pike west of Nashville. The motel's security videotapes showed two men at the front desk, a maroon van and a white van in the parking lot, and persons coming and going from the vans. Although the tapes were not sufficiently clear to permit an identification of any of the men, the desk clerk identified Londono and Guartos from photographic arrays. (Pet. App. 10-12)

A search of the two motel rooms yielded additional evidence. Inside the closet of one room, investigators found a box of ammunition consistent with the bullet that struck Rogers. Londono's fingerprint was found inside the box and Gomez' and Guartos' fingerprints were found on the telephone. Telephone records revealed that a call had been made on March 14 from the motel room to a pay telephone located outside a restaurant "[a]bout a block and a half" from the mall. Another call had been made on March 16 to a pay telephone located inside the mall directly across from the jewelry store where the watches were displayed. On March 15 and 16, a calling card had been used to place calls from the motel room and from a Nashville restaurant to two different numbers in Bogotá, Colombia. The same card was used on the afternoon of March 17 to place a call from Montgomery, Alabama, to Miami, Florida, and was used again on the morning of March 18 to place a call to Bogotá from Gomez' home telephone number in Miami. (Pet. App. 12-13)

Julie Jimenez, who had lived with Londono in Miami in the spring of 1999, testified that Londono and Gomez lived in the same apartment complex and that Gomez had visited Londono's apartment daily. Before leaving town for "[s]even or ten days" in the spring of 1999, Londono told Jimenez that he was going somewhere to make money, but he refused to tell her where. Jimenez recalled that Londono left Miami with Gomez, Guartos, Guartos' wife, and three other Hispanic men whom she did not know. The group left Miami in two vehicles, a white van and a maroon van. Shortly before Londono returned, he telephoned Jimenez and told her that he had been to Tennessee, that he had Rolex watches, and that he planned to give her one. She heard Gomez' voice in the background during the conversation. When Londono returned to Miami, he gave Jimenez some Nashville postcards and a report of the trip. He told her that the group had stolen Rolex watches from a jewelry store in a shopping mall in Tennessee. He told her that he had disarmed one of the security guards who had pulled a gun and that another member of the group shot the guard because he had seen Londono's face. Jimenez recalled that Londono received a share of the money from the sale of the watches a few days later. On April 4, Jimenez and Londono went on a shopping spree, spending $3,000 cash on furniture, a television, and other items for Londono's apartment. At Londono's insistence, all of the items were purchased under Jimenez' name. (Pet. App. 13-15)

On April 25, Miami police arrested Londono and Gomez on unrelated charges. A search of Londono's maroon van yielded a postcard of the Nashville riverfront area. A search of Gomez' apartment produced $19,600 in cash concealed between the kitchen counter and the

dishwasher, a furniture receipt for $570 dated March 25, and three money transfer receipts evidencing transfers totaling $6,000 from Gomez and his roommate to persons in Bogotá. The telephone numbers of the persons to whom the money was sent matched the telephone numbers to which the calls had been placed from the motel and restaurant in Nashville. Two of the money transfers occurred on March 23. (Pet. App. 15-16)

When questioned by Nashville police, both Londono and Gomez denied ever being in Nashville. Guartos, however, confessed his involvement and told police that the group used two rented vans, one wine-colored or red, the other white; that they stayed at a Howard Johnson's and used two rooms; that the group got $230,000 for the watches taken in the robbery; and that he used his share of $40,000 to buy his home in Miami. (Pet. App. 16-18)

2. Gomez, Londono, Guartos, and Luzdari Sierra Jimenez were charged in a four-count indictment: Count I, conspiracy to commit aggravated robbery; Count II, first degree murder of Rogers (in the perpetration or attempt to perpetrate a robbery); Count III, especially aggravated robbery of Rogers; and Count IV, aggravated robbery of Nagele. Guartos and Jimenez were tried separately, and Guartos was convicted as charged.[1] After a joint trial by jury in Davidson County Criminal Court in February 2002, Gomez and Londono were convicted of Count I as charged; under Count II, facilitation of felony murder as a lesser-included offense; under Count III, facilitation of especially aggravated robbery as a lesser-included offense;

[1] The record does not reflect the sentences received by Guartos or the disposition of the charges against Luzdari Sierra Jimenez.

and under Count IV, facilitation of aggravated robbery as a lesser-included offense. (Pet. App. 18-19)

Following a sentencing hearing, the trial court found, with respect to all four offenses, that each petitioner had "a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range" of punishment and that each petitioner was "a leader in the commission of the offense involving two (2) or more actors." With respect to the offense of facilitation of felony murder, the court found additionally that each petitioner "possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense." The court then imposed the maximum sentence for each offense for each petitioner: six years for conspiracy, 25 years for facilitation to commit felony murder, twelve years for facilitation to commit especially aggravated robbery, and six years for facilitation to commit aggravated robbery. The court ordered consecutive service of the sentences for an effective sentence of 49 years for each petitioner. (Pet. App. 19)

3. Both the Tennessee Court of Criminal Appeals and the Supreme Court of Tennessee affirmed the judgment of the trial court. With respect to petitioners' Sixth Amendment claim that their sentences were imposed in violation of this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), the Tennessee Supreme Court found that petitioners had failed to raise the claim in the courts below and therefore had failed to preserve the claim for review. (Pet. App. 52-53, 63) Furthermore, the court concluded that petitioners failed to satisfy their burden of demonstrating that review was warranted under the state's plain-error rule because Tennessee's sentencing

scheme did not violate the Sixth Amendment. (Pet. App. 102)

REASONS FOR DENYING THE WRIT

Petitioners contend that their sentences were imposed in violation of the Sixth Amendment right to a jury trial. Specifically, they maintain that enhancement factors found by a judge by a preponderance of the evidence – not by a jury beyond a reasonable doubt – were used to impose sentences above the prescribed statutory maximum sentences authorized solely by the facts reflected by the jury verdict or admitted by petitioners, contrary to this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). Furthermore, they assert that the decision in *United States v. Booker*, 125 S.Ct. 738 (2005), did not overrule or modify those decisions to permit the sentences imposed, contrary to the conclusion reached by the Tennessee Supreme Court. Respondent acknowledges, as it did below, that petitioners' sentences were imposed in violation of the Sixth Amendment as interpreted in *Apprendi* and *Blakely*, that *Booker* does not alter that conclusion, and that the Tennessee Supreme Court's assertion otherwise is in conflict with decisions of other state supreme courts applying *Apprendi*, *Blakely*, and *Booker* to similar facts. *See State v. Allen*, 615 S.E.2d 256 (N.C. 2005), and *State v. Natale*, 184 N.J. 458, 878 A.2d 724 (2005).[2] Nevertheless,

[2] Under Tennessee's sentencing scheme in effect at the time of petitioners' sentencing hearing, an offender's sentencing "range" was determined by the offender's record of prior convictions. Tenn. Code Ann. §§ 40-35-105 through -109 (2003). The trial court then imposed a

(Continued on following page)

for the reasons that follow, review of the question presented is foreclosed on jurisdictional grounds and, in any event, is unwarranted.

1. This Court lacks jurisdiction to review the federal constitutional question because the judgment of the Tennessee Supreme Court rests on adequate and independent state-law grounds. Neither petitioner raised a Sixth Amendment objection to the sentencing procedure utilized at the sentencing hearing, and neither petitioner raised a Sixth Amendment challenge on appeal to the intermediate Court of Criminal Appeals. The Tennessee Supreme Court, after noting these procedural defaults, concluded that "the defendants failed to raise and to preserve for review their Sixth Amendment challenge . . . " and thus were limited to plain-error review. (Pet. App. 63)

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specific determinate sentence within the range for each offense based on enhancement and mitigating factors. §§ 40-35-203, -210, -211. A "presumptive" sentence within each range, established as the midpoint of the range for Class A felonies and the minimum of the range for Class B, C, D, and E felonies, § 40-35-210(c), was the point of departure for the imposition of the sentence. § 40-35-210(d), (e). Thus, the trial court could not impose a sentence above the presumptive minimum unless it found at least one enhancement factor. *See State v. Jones*, 883 S.W.2d 597, 601 (Tenn. 1994). The trial judge in this case found enhancement factors applicable to each of petitioners' offenses and sentenced petitioners to the maximum sentence in the range for each offense, well above the presumptive minimum. None of the enhancement factors found by the trial judge was admitted by petitioners or found by the jury beyond a reasonable doubt. Respondent conceded below that the sentences violated the Sixth Amendment under *Apprendi* and *Blakely* but contended that petitioners had forfeited review and that the error did not rise to the level of plain error because consideration of the claim was not "necessary to do substantial justice." *See* Tenn.R.Crim.P. 52(b).

Under Tennessee law, plain-error review is not mandatory, but discretionary with the appellate court. Tenn.R.Crim.P. 52(b) ("An error which has affected the substantial rights of an accused *may* be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice") (emphasis added) and advisory committee comment ("Plain error may, not must, be noticed by the appellate court, even where substantial justice is involved.") In order for an error to even qualify for plain-error review, all of the following factors must be present:

> (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice."

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). Complete consideration of all the factors is unnecessary when it is clear from the record that at least one of the factors cannot be established. *Smith*, 24 S.W.3d at 283. In addition, the plain error must be "of such a great magnitude that it probably changed the outcome of the trial." *Id.* (quoting *Adkisson*, 899 S.W.2d at 642). Applying these considerations, the Tennessee Supreme Court declined to grant plain-error relief. The Court opined that petitioners failed to demonstrate that "a clear and unequivocal rule of law must have been breached" because Tennessee's sentencing scheme did not violate the Sixth Amendment. (Pet. App. 102)

Thus, the judgment rests on two grounds, both based on state procedural rules: first, that the claim was not preserved for appeal; second, that the claimed error did not amount to plain error. Because this Court lacks jurisdiction to review a state court's resolution of a federal question if the state court's judgment rests on an adequate and independent state ground, the resolution of the question presented by petitioners is barred. *See Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.")

The first state-law ground (that the claim was not preserved for appeal) is clearly adequate to support the judgment. The rules requiring a party to object contemporaneously to a claimed error and to raise an issue in the intermediate appellate court before presenting it to the state supreme court are regularly applied in the Tennessee courts to bar review of claims, without regard to the merits or without recourse to plain-error analysis. *See, e.g., State v. Sutton*, 562 S.W.2d 820, 825 (Tenn. 1978) ("Without a contemporaneous objection, the error is waived."); *In re Valentine*, 79 S.W.3d 539, 544 n.3 (Tenn. 2002) (constitutional issue "waived because it was raised for the first time in this Court"). And because these rules do not depend upon a federal constitutional ruling on the merits to make them efficacious, their application is independent of federal law. *See Stewart v. Smith*, 536 U.S. 856, 860 (2002).

The second state-law ground (the claimed error did not amount to plain error) involves nothing more than the exercise of discretion under a Tennessee rule of criminal

procedure, informed by non-constitutional criteria developed by the Tennessee appellate courts. *See Adkisson*, 899 S.W.2d at 636-43 (discussing origins and application of Tenn.R.Crim.P. 52(b)). It is beyond doubt that a decision not to review a claimed error as plain error is adequate to support a judgment. *See, e.g., United States v. Cotton*, 535 U.S. 625, 634 (2002) (denying relief under federal plain-error rule). Under the Tennessee rule, a court *may*, not must, grant relief and, then, only if the plain error is "of such a great magnitude that it probably changed the outcome of the trial." Thus, the application of the rule is independent of the federal question – despite the fact that one consideration is whether a clear and unequivocal rule of law was breached – because the ultimate determination of whether to grant plain-error relief is a matter of absolute discretion, the exercise of which is dependent on several variables, including the probable effect of the claimed error on the outcome of the trial. Thus, while a plain-error analysis may include an examination of a federal question, it is *never* necessary for the court to perform that examination, and, regardless, the resolution of the federal question may be trumped by another factor or simply ignored in the exercise of discretion to deny review.

But even if the plain-error analysis in this case can be said to be dependent on the resolution of a federal question so that the state-law ground is deprived of independent support for the judgment, *see, e.g., Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985) (where, in applying state's procedural bar, state court must rule on the federal constitutional question, this Court's jurisdiction is not precluded), the state court's plain-error determination is only an alternative basis for the judgment, which rests equally

upon the petitioner's procedural defaults. Under these circumstances, the alternative ground is sufficient to support the judgment, and this Court's review of petitioners' Sixth Amendment claim is barred. *See Sochor v. Florida*, 504 U.S. 527, 533-34 (1992) (Alternative ground that the claims were not preserved for appeal deemed adequate and independent to bar this Court's review where state court found that Eighth Amendment claims were "not preserved for appeal" but, "[i]n any event, [the] claims here have no merit").

2. Furthermore, the Tennessee Supreme Court's determination that petitioners were not entitled to plain-error relief is correct without regard to the resolution of the federal question. The trial court applied two enhancement factors to all four offenses in sentencing petitioners to the maximum punishment: a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range (Tenn. Code Ann. § 40-35-114(2)); and both petitioners were leaders in the commission of the offense involving two or more actors (Tenn. Code Ann. § 40-35-114(3)).[3] In imposing the maximum sentences, the trial court placed particularly great weight on petitioners' previous history of criminal convictions. (R. 871-72) The application of this enhancement

[3] The trial court also applied another enhancement factor (the defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense (Tenn. Code Ann. § 40-35-114(10)) to petitioners' convictions for facilitation of first degree felony murder. However, because the evidence was insufficient to support this enhancement factor, the Court of Criminal Appeals reversed its application. The Court of Criminal Appeals then correctly determined that all four sentences were supported by the remaining two enhancement factors.

factor did not violate the Sixth Amendment because the only facts used to establish it were petitioners' prior convictions.[4] (R. 835-41) *See Apprendi*, 530 U.S. at 490 ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") (emphasis added). With respect to the second enhancement factor, the fingerprint evidence and the testimony showing Gomez and Londono as active participants in the planning and execution of the robbery, the getaway, and the distribution of the proceeds overwhelmingly established that both men were leaders in the commission of the offenses.

As discussed above, under the Tennessee Supreme Court's plain-error jurisprudence, plain-error relief is available only if all five *Smith* factors are established and the error is of such great magnitude that it probably changed the outcome of the proceeding. The burden of persuasion on plain-error claims is on the defendant, not the State. *State v. Litton*, 161 S.W.3d 447, 454 (Tenn. Crim. App. 2004). Because the enhancing force of petitioners' prior history of criminal convictions, either alone or in conjunction with the other enhancement factor, supports the sentences imposed, petitioners cannot show that consideration of the *Apprendi* error is "necessary to do substantial justice" or that the error probably changed the outcome of the proceeding. Because the Tennessee Supreme Court's denial of plain-error relief was correct regardless of its view of the federal question, this Court's review of the judgment is unwarranted.

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[4] Gomez had been convicted in federal court in 1999 of theft, and Londono had been convicted in a Texas court of manslaughter.

3. Finally, any determination of the question presented by the petitioner would have such limited impact that it is not worthy of this Court's attention. Following this Court's decision in *Blakely*, the Tennessee General Assembly enacted remedial legislation. *See* 2005 Tenn. Pub. Acts, ch. 353. (App. 1a-14a) Under the new act, which became effective upon the Governor's signature on June 7, 2005, and which is applicable to sentencing hearings for offenses committed on or after that date, the presumptive-sentence provisions applied in sentencing petitioners were replaced with a series of advisory guidelines, which include enhancement and mitigating factors and a statement of principles and sentencing considerations. The sentencing judge must consider, but is not bound by, these guidelines to arrive at an appropriate sentence within the range. *Id.* at §§ 5, 6. (App. 2a-8a) Because the imposition of a sentence under the act is based on "merely advisory provisions that recommend[], rather than require[], the selection of particular sentences in response to differing sets of facts," the Sixth Amendment is not implicated. *United States v. Booker*, 125 S.Ct. 738, 750 (2005) (Opinion of Stevens, J.). Petitioners' concern that the prospective application of the new act will be of no practical benefit to petitioners and others who are still being sentenced under the former provisions is insubstantial. In most cases, as in this case, the issue will have been waived or the error will not have had an effect on the length of the sentence imposed. Furthermore, in all likelihood, by the time this case can be briefed, heard, and decided, a substantial number of sentencing hearings will already have been conducted under the new act, and, therefore, any decision in this case will affect only a relatively small number of cases. In other words, the error in the decision below of

which petitioner complains has already been corrected by the Tennessee General Assembly.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Public Acts, 2005

CHAPTER NO. 353

SENATE BILL NO. 2249

By Kyle, Haynes

Substituted for: House Bill No. 2262

By McMillan, Fowlkes, Shaw

AN ACT to amend Tennessee Code Annotated, Title 39, Title 40 and Title 55, relative to the sentencing of persons convicted of criminal offenses.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 40-35-102(6), is amended by deleting the existing language and substituting the following language:

(6) A defendant who does not fall within the parameters of subdivision (5) and who is an especially mitigated or standard offender convicted of a Class C, D or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider but is not bound by this advisory sentencing guideline.

SECTION 2. Tennessee Code Annotated, Section 40-35-106(b)(4), is amended by deleting the existing language and substituting the following:

(4) Except for convictions whose statutory elements include serious bodily injury, bodily injury or threatened serious bodily injury or bodily injury to the victim or victims, convictions for multiple felonies committed within the same twenty-four (24) hour period constitute one (1) conviction for the purpose of determining prior convictions; and

SECTION 3. Tennessee Code Annotated, Section 40-35-107(b)(4), is amended by deleting the existing language and substituting the following language:

(4) Except for convictions whose statutory elements include serious bodily injury, bodily injury or threatened serious bodily injury or bodily injury to the victim or victims, convictions for multiple felonies committed within the same twenty-four (24) hour period constitute one (1) conviction for the purpose of determining prior convictions; and

SECTION 4. Tennessee Code Annotated, Section 40-35-108(b)(4), is amended by deleting the existing language and substituting the following:

(4) Except for convictions whose statutory elements include serious bodily injury, bodily injury or threatened serious bodily injury or bodily injury to the victim or victims, convictions for multiple felonies committed within the same twenty-four (24) hour period constitute one (1) conviction for the purpose of determining prior convictions; and

SECTION 5. Tennessee Code Annotated, Section 40-35-114, is amended by deleting the section in its entirety and substituting instead the following:

§ 40-35-114. If appropriate for the offense and if not themselves an essential element of the offense, the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence:

(1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

(2) The defendant was a leader in the commission of an offense involving two or more criminal actors;

(3) The offense involved more than one victim;

(4) A victim of the offense was particularly vulnerable because of age or physical or mental disability;

(5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

(6) The personal injuries inflicted upon, or the amount of damage to property, sustained by or taken from the victim was particularly great;

(7) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;

(8) The defendant, before trial or sentencing, has failed to comply with the conditions of a sentence involving release into the community;

(9) The defendant possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense;

(10) The defendant had no hesitation about committing a crime when the risk to human life was high;

(11) The felony resulted in death or serious bodily injury or involved the threat of death or serious bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or serious bodily injury;

(12) During the commission of the felony, the defendant intentionally inflicted serious bodily injury

upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim;

(13) At the time the felony was committed, one of the following classifications was applicable to the defendant:

(A) Released on bail or pretrial release, if the defendant is ultimately convicted of such prior misdemeanor or felony;

(B) Released on parole;

(C) Released on probation;

(D) On work release;

(E) On community corrections;

(F) On some form of judicially ordered release;

(G) On any other type of release into the community under the direct or indirect supervision of any state or local governmental authority or a private entity contracting with the state or a local government;

(H) On escape status; or

(I) Incarcerated in any penal institution on a misdemeanor or felony charge or a misdemeanor or felony conviction;

(14) The defendant abused a position of public or private trust, or used a professional license in a manner that significantly facilitated the commission or the fulfillment of the offense;

(15) The defendant committed the offense on the grounds or facilities of a pre-kindergarten

through grade twelve public or private institution of learning when minors were present;

(16) The defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult;

(17) The defendant intentionally selected the person against whom the crime was committed or selected the property that was damaged or otherwise affected by the crime in whole or in part because of the defendant's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, ancestry, or gender of that person or the owner or occupant of that property; however, this subsection should not be construed to permit the enhancement of a sexual offense on the basis of gender selection alone;

(18) The offense was an act of terrorism, or was related to an act of terrorism;

(19) If the defendant is convicted of the offense of aggravated assault pursuant to § 39-13-102, the victim of the aggravated assault was a law enforcement officer, firefighter, correctional officer, youth services officer, probation and parole officer, a state registered security officer/guard, an employee of the department of correction or the department of children's services, an emergency medical or rescue worker, emergency medical technician, or paramedic, whether compensated or acting as a volunteer; provided, that the victim was performing an official duty and the defendant knew or should have known that the victim was such an officer or employee;

(20) If the defendant is convicted of the offenses of rape pursuant to § 39-13-503, sexual battery pursuant to § 39-13-505, or rape of a child pursuant to § 39-13-522, the defendant caused the victim to be

mentally incapacitated or physically helpless by use of a controlled substance;

(21) If the defendant is convicted of the offenses of aggravated rape pursuant to § 39-13-502, rape pursuant to § 39-13-503, rape of a child pursuant to § 39-13-522 or statutory rape pursuant to § 39-13-506, the defendant knew or should have known that at the time of the offense such defendant was HIV positive; or

(22)(A) If the defendant is convicted of the offenses of aggravated arson pursuant to § 39-14-302 or vandalism pursuant to § 39-14-408, the damage or destruction was caused to a structure, whether temporary or permanent in nature, used as a place of worship and the defendant knew or should have known that it was a place of worship.

(B) As used in this enhancement factor, "place of worship" means any structure that is:

(i) Approved, or qualified to be approved, by the state board of equalization for property tax exemption pursuant to § 67-5-212, based on ownership and use of the structure by a religious institution; and

(ii) Utilized on a regular basis by such religious institution as the site of congregational services, rites or activities communally undertaken for the purpose of worship.

SECTION 6. Tennessee Code Annotated, Section 40-35-210, is amended by deleting the section in its entirety and substituting instead the following:

§ 40-35-210.

(a) At the conclusion of the sentencing hearing, the court shall first determine the appropriate range of sentence.

(b) To determine the specific sentence and the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider the following:

(1) The evidence, if any, received at the trial and the sentencing hearing;

(2) The presentence report;

(3) The principles of sentencing and arguments as to sentencing alternatives;

(4) The nature and characteristics of the criminal conduct involved;

(5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;

(6) Any statistical information provided by the administrative office of the court as to sentencing practices for similar offenses in Tennessee; and

(7) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

(c) The court shall impose a sentence within the range of punishment determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:

(1) The minimum sentence within the range of punishment is the sentence which should be imposed because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications.

(2) The sentence length within the range should be adjusted as appropriate by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

(d) The sentence length within the range should be consistent with the purposes and principles of this chapter.

(e) When the court imposes a sentence, it shall place on the record either orally or in writing what enhancement or mitigating factors it considered, if any, as well as the reasons for the sentence in order to ensure fair and consistent sentencing.

(f) A sentence must be based on evidence in the record of the trial, the sentencing hearing, the presentence report, and the record of prior felony convictions filed by the district attorney general with the court as required by § 40-35-202(a).

SECTION 7. Tennessee Code Annotated, Section 40-35-303, is amended by deleting subsection (a) and substituting instead the following:

(a) A defendant shall be eligible for probation under the provisions of this chapter if the sentence actually imposed upon such defendant is ten (10) years or less. However, no defendant shall be eligible for probation under the provisions of this chapter if convicted of a violation of § 39-17-417(b) or (i), § 39-13-304, § 39-13-402, § 39-15-402 or § 39-13-504. A defendant shall

also be eligible for probation pursuant to § 40-36-106(e)(3).

SECTION 8. Tennessee Code Annotated, Section 40-35-401, is amended by deleting the section in its entirety and substituting instead the following:

§ 40-35-401.

(a) The defendant in a criminal case may appeal from the length, range or the manner of service of the sentence imposed by the sentencing court. The defendant may also appeal the imposition of consecutive sentences. An appeal pursuant to this section shall be taken within the same time and in the same manner as other appeals in criminal cases. If there is an appeal of the conviction, the appeal of the sentence shall be taken at the same time. There is no appellate review of the sentence in a post-conviction or habeas corpus proceeding.

(b) An appeal from a sentence may be on one (1) or more of the following grounds:

(1) The sentence was not imposed in accordance with this chapter;

(2) The sentence is excessive under the sentencing considerations set out in §§ 40-35-103 and 40-35-210; or

(3) The sentence is inconsistent with the purposes of sentencing set out in §§ 40-35-102 and 40-35-103.

(c) If a sentence is appealed, the appellate court may:

(1) Dismiss the appeal;

(2) Affirm, reduce, vacate or set aside the sentence imposed;

(3) Remand the case or direct the entry of an appropriate sentence or order; or

(4) Direct any further proceedings appropriate or required under the circumstances.

(d) When reviewing sentencing issues raised pursuant to subsection (a), including the granting or denial of probation and the length of sentence, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.

SECTION 9. Tennessee Code Annotated, Section 40-35-402, is amended by deleting the section in its entirety and substituting instead the following:

§ 40-35-402.

(a) The district attorney general in a criminal case may appeal from the length, range or manner of the service of the sentence imposed by the sentencing court. The district attorney general may also appeal the imposition of concurrent sentences. In addition, the district attorney general may also appeal the amount of fines and restitution imposed by the sentencing court. An appeal pursuant to this section shall be taken within the same time and in the same manner as other appeals in criminal cases. The right of the appeal of the state is independent of the defendant's right of appeal.

(b) An appeal from a sentence is limited to one (1) or more of the following conditions:

(1) The court improperly sentenced the defendant to the wrong sentence range;

(2) The court granted all or part of the sentence on probation;

(3) The court ordered all or part of the sentences to run concurrently;

(4) The court improperly found the defendant to be an especially mitigated offender;

(5) The court failed to impose the fines recommended by the jury;

(6) The court failed to order the defendant to make reasonable restitution; or

(7) The sentence is inconsistent with the purposes or considerations of sentencing set out in §§ 40-35-102 and 40-35-103.

(c) If the sentence is appealed by the state, the appellate court may affirm, vacate, set aside, increase or reduce the sentence imposed or remand the case or direct the entry of an appropriate order.

(d) When reviewing sentencing issues raised pursuant to this section, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.

SECTION 10. Tennessee Code Annotated, Section 39-13-102, is amended by deleting subsection (d)(1) in its entirety and substituting instead the following:

(d)(1) Aggravated assault under subdivision (a)(1) or subsection (b) or (c) is a Class C felony. Aggravated assault under subdivision (a)(2) is a Class D felony.

SECTION 11. Tennessee Code Annotated, Section 39-13-503, is amended by deleting subsection (c) in its entirety.

SECTION 12. Tennessee Code Annotated, Section 39-13-505, is amended by deleting subsection (d) in its entirety.

SECTION 13. Tennessee Code Annotated, Section 39-13-521, is amended by deleting subsection (d)(1) and by renumbering subsequent subdivisions of such subsection accordingly.

SECTION 14. Tennessee Code Annotated, Section 39-13-522, is amended by deleting subsection (c) in its entirety.

SECTION 15. Tennessee Code Annotated, Section 39-14-302, is amended by deleting subsection (b) and substituting instead the following:

(b) Aggravated arson is a Class A felony.

SECTION 16. Tennessee Code Annotated, Section 39-14-408, is amended by deleting subsection (c) and substituting instead the following:

(c) Acts of vandalism are to be valued according to the provisions of § 39-11-106(a)(36) and punished as theft under § 39-14-105.

SECTION 17. Tennessee Code Annotated, Section 40-36-106, is amended by adding the following to the end of subsection (e)(4):

Such resentencing shall be conducted in compliance with § 40-35-210.

SECTION 18. This act shall apply to sentencing for criminal offenses committed on or after the effective date of this act. Offenses committed prior thereto shall be governed by prior law, which shall apply in all respects. However, for defendants who are sentenced after the effective date of this act for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of this act by executing a waiver of such defendant's ex post facto protections. Upon executing such a waiver, all provisions of this act shall apply to the defendant.

SECTION 19. This act shall have no application to sentencing for persons convicted of murder in the first degree which shall be governed by the provisions of §§ 39-13-202 – 39-13-208.

SECTION 20. (a) The Tennessee Code Commission is requested to publish any commentary appended to this bill by the Governor's Task Force on the Use of Enhancement Factors in Criminal Sentencing.

(b) The Tennessee Code Commission is requested to insert a cross reference in §§ 39-13-102, 39-13-502, 39-13-503, 39-13-505, 39-13-506, 39-13-522, 39-14-302 and 39-14-408 to § 40-35-114 stating that the enhancement factor formerly found in each such section was moved to § 40-35-114 so that all enhancement factors are located in one (1) section.

SECTION 21. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 22. This act shall take effect upon becoming a law, the public welfare requiring it and shall apply as provided in Section 18.

PASSED: May 18, 2005

/s/ John S. Wilder
JOHN S. WILDER
SPEAKER OF THE SENATE

/s/ Jimmy Naifeh
JIMMY NAIFEH, *SPEAKER*
HOUSE OF REPRESENTATIVES

APPROVED this 7th day of June 2005

/s/ Phil Bredesen
PHIL BREDESEN, GOVERNOR